

Claimant worked for respondent company for 14 years. His Form E-1 Application for Hearing filed January 30, 1995 alleges a wrist injury occurring May 15, 1994 while performing various duties for IBP, Inc. The claimant's testimony and the medical records

in evidence indicate claimant suffered a series of accidents by repetitive use or mini-traumas over a period of years while working for respondent. This would include the accident date alleged by claimant; although, under the bright line rule announced by the Kansas Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), a more appropriate accident date would probably be the last date claimant worked for respondent if claimant had left work due to this injury. It is not clear from the claimant's testimony exactly why he terminated his employment with respondent on or about December 19, 1994. It does not appear to have been due to his physical condition because he returned to work for another employer doing similar work. However, claimant does indicate that at the time he was terminated and left his job with respondent, he was working light duty in cleanup because his arms and legs were hurting him.

Claimant testified that he complained to his supervisors all the time concerning his right upper extremity pain. He admits there was no specific accident or single traumatic event occurring on May 15, 1994 or on any other date. He was specifically asked whether he recalls complaining to his supervisor regarding pain in his arm in October or November of 1994. Claimant stated that he recalled doing so and was sent to the company infirmary as on other occasions. It is not clear why claimant was asked about these dates when he alleged an accident date of May 15, 1994. The questioning of claimant at the April 9, 1996 preliminary hearing suggested that claimant was alleging an accident each and every day worked. However, the pleadings and documents on file with the Division of Workers Compensation reflect an allegation of a single accident date by claimant and there was no request made at the preliminary hearing to amend the claim insofar as date of accident was concerned. There was some discussion concerning an amendment of this claim to include the entire upper extremity and shoulder, although this was not done.

Respondent took the deposition testimony of two of claimant's supervisors. They denied claimant gave them notice of an accident to claimant's wrist on the date alleged. In fact, they denied their having received any report of injury or accident from claimant. Claimant disputed this, indicating that he made frequent complaints to his supervisors. Their response would be to send him to the company nurse at the infirmary where he would be given tablets, ice packs or bandages. The health services records of respondent support claimant's contention in this regard. Also, Rito Lopez, claimant's supervisor during the period in question, did recall taking claimant to the nurse on more than one occasion, although he did not remember why. From the record taken as a whole, the Appeals Board finds that the claimant gave timely notice of injury.

Docket 198,368

The Administrative Law Judge denied claimant's preliminary hearing request for medical treatment in this docketed claim. Claimant alleged injury to his left knee in August 1994 while performing various duties for IBP, Inc. Respondent included Docket No. 198,368 on its Application for Review to the Appeals Board but did not specifically raise an issue concerning this claim, although it is discussed in respondent's brief.

Claimant states in his brief that he is not proceeding with any type of appeal in Docket No. 198,368 and that, therefore, the issues are moot and should not be considered by the Appeals Board. Accordingly, the Appeals Board affirms the findings and conclusions of the Administrative Law Judge in Docket No. 198,368.

Docket No. 198,369

ISSUES

The Administrative Law Judge ordered medical treatment for claimant's hearing loss. Respondent appeals raising the single issue of whether claimant's injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant's Form E-1 Application for Hearing alleged hearing loss attributable to his performing various duties for IBP, Inc. on December 8, 1994. Claimant testified he worked at IBP, Inc. for 14 years and terminated his employment in December of 1994. At the April 9, 1996 preliminary hearing, claimant testified that his hearing loss was the result of his years of exposure to loud noises at IBP, Inc. Claimant admitted that he was provided with and regularly used noise protection equipment. He was tested periodically for hearing loss at IBP, Inc. According to claimant, on one such occasion he was informed by the company nurse that he had a hearing loss.

The primary evidence on the issue of claimant's hearing loss is the January 24, 1996 report of Dr. Richard J. Cummings. Dr. Cummings states, "The pattern of [claimant's] hearing loss is flat, not typical of noise-induced hearing loss." Nevertheless, "[f]rom his examination, from his history, from his audiogram and from the records that we have presently available, it would be my opinion that no more than 20% of his hearing loss is due to noise related factors."

Respondent contends that the opinions of Dr. Cummings are speculative and are not stated to a reasonable degree of medical certainty. It is true that Dr. Cummings is somewhat equivocal in his opinions and, in addition, does not specifically state the degree of claimant's hearing loss attributable to claimant's exposure at work with respondent. Nevertheless, we understand Dr. Cummings' report to specifically find that some percentage of claimant's hearing loss, not more than 20 percent, is due to claimant's exposure to noise at work. Accordingly, the Order by the Administrative Law Judge for medical treatment to be furnished to claimant at respondent's expense should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the April 10, 1996 Order of Administrative Law Judge Jon L. Frobish in Docket Nos. 198,367, 198,368 and 198,369 should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 1996.

BOARD MEMBER

c: Richard L. Marquez, Garden City, KS
Craig A. Posson, Dakota City, NE
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director